IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5571 OF 2007

Savkar Ganu Gosavi..... ....Petitioner
V/s
The State of Maharashtra & Ors.. ....Respondents.

Mr.G.N.Salunkhe, Adv. For the petitioner.

Mrs.P.S.Cardozo AGP For the respondent No.1.

CORAM: A.P.DESHPANDE, J.
18/9/07

PC:

The present petitioner by filing an election petition called in question the election of respondent No.2 as a Councilor of the Municipal Council, Ichalkaranji and further sought a declaration that the petitioner be declared to have been elected. In the elections held in November, 2006 the present petitioner, respondent No.2 an elected candidate and another candidate by name Vikas Appa Gaud-respondent No.3 had contested for the seat of a councilor from ward No.5 which was reserved for other backward class (OBC). Respondent No.2 the elected candidate secured 1239 votes whereas the petitioner secured 967 votes and other contesting candidate-respondent No.3 secured 426 votes. The main ground of challenge in the election petition was that the respondent No.2 does not belong to OBC category and had contested the election on the basis of false caste certificate which was accepted by the Returning Officer despite an objection raised by the election petitioner. The Caste Scrutiny committee has canceled the caste certificate of the elected candidate as he was found to be not belonging to OBC category and thus the election of the respondent No.2 stood vitiated. Thus the

only prayer for declaration that the election petitioner is duly elected candidate at the election was pressed in service and the rejection of the said prayer is the cause for the petitioner to challenge the judgment and order passed by the trial Court. The trial Court has held that under the scheme of section 21 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (the "Act") a declaration under sub-section 10 that the petitioner has been duly elected can be made subject to the satisfaction of conditions prescribed in sub-section 10 of the act. The trial Judge found that as there were three candidates in the fray a declaration in favour of the candidate drawing second highest votes cannot be granted. The learned counsel for the petitioner has placed reliance on a judgment in the case of ***Sagiruddin Israiluddin Mistry & Anr.*** V/s ***State of Maharashtra & Ors.,*** 2007 (2) Mh.L.J. 55. In the said case what fell for consideration of the High Court was interpretation of section 33(2) of the Mumbai Municipal Corporation Act, 1888 ("MMC Act"). The relevant provision contained in section 33 (2) of the Mumbai Municipal Corporation Act ("MMC Act") reads thus:

> "33(2). If the said Chief Judge, after making such inquiry as he deems necessary, finds that the election was a valid election and that the person whose election is objected to is not disqualified, he shall confirm the declared result of the election [if he finds that the person whose election is objected to is disqualified for being a Councilor he shall declare such person' s election null and void. If he finds that the election is not a valid election he shall set it aside. In either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person and against whose election no cause of objection is found, shall be deemed to have been elected.]"

A careful perusal of the above provision reveals that if the Judge finds that the candidate, if any, in whose favour the next highest number of valid votes is recorded and against whose election no cause of objection is found shall be deemed to have been elected. It is thus clear that section 33(2) introduces a deeming fiction that a candidate in whose favour next highest number of valid votes are recorded and against whose election no cause of objection is found shall be deemed to have been elected. On account of the said deeming fiction comprised in section 33(2) of the MMC act the Division Bench has made a declaration in favour of the candidate who had secured next highest number of votes. Learned counsel for the petitioner then placed reliance on a judgment in the case of ***Mane Kunal Naresh*** v/s ***Pawar Vithal Jyoti,*** 1999(1) ALL MR 491. The said case was again under section 33 of the MMC act. AS stated herein above as section 33(2) of the Corporation Act introduces a deeming fiction that the candidate in whose favour next highest number of valid votes is recorded and against whose election no cause of objection is found, shall be deemed to have been elected. Hence learned Single Judge did not interfere with the declaration made by the lower Court in favour of the candidate securing next highest number of votes.

2. In the present case section 21 (10) needs to be interpreted which prescribes all together different criteria for making a declaration. The phraseology used in sub-section (10) of section 21 of the Act is to a great extent similar to the provisions contained in section 101 of the Representation of the People Act, 1951 which reads thus:

> "101.**Grounds for which a candidate other than the returned candidate may be declared to have been elected.**---If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly

elected and [the High Court] is of opinion--

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,

[the High Court] shall, after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected."

3. The section provides that a person who has lodged the election petition, has in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of the opinion that in fact the petitioner or such other candidate received a majority of valid votes or that but for the votes obtained by returned candidate by corrupt practices the petitioner or such other candidate would have obtained the majority of valid votes, the High Court shall declare the petitioner or such other candidate to have been duly elected. Section 101 fell for interpretation of the Supreme Court in the case of ***Prakash*** Khandre v/s ***Dr.Vijaya Kumar Khandre &*** Ors., AIR 2002 SC 2345 and while dealing with the said provision the Supreme Court formulated the issue in para 11 of its judgment :

"11. However, the question which requires consideration is – if there are more than two candidates for one seat and the elected candidate is subsequently found to be disqualified, whether the candidate who has secured more votes than remaining candidates should be declared as elected or not?"

The Supreme Court in para 14 observed thus:

> "14. However, in an election where elected candidate is declared to be disqualified to contest election and there are more than two candidates contesting election, there is no specific provision under the Act under which the person who has secured the next highest number of votes could be declared as elected. The Act is silent on this point. Further, it cannot be presumed that the votes secured by the disqualified elected candidates would have been wasted or would have been secured by the next candidate who has secured more votes. If disqualified candidate was not permitted to contest the election then how the voters would have votes in favour of the candidate who has secured more votes than other remaining candidates would be a question in the realm of speculation and unpredictability. In such a situation, declaring the election of the returned candidate on the ground of his initial disqualification to contest the election by itself would not entitle the election petitioner or any other candidate to be declared elected."

It then proceeded and concluded in para 24 that the doctrine of wasted votes or thrown away votes, which is a general rule of election law prevailing in United Kingdom, has no application in India.

4. Supreme Court judgment concludes the issue by observing that if there are more than two persons contesting election and if the election of the returned candidate is set aside, then there cannot be automatic declaration in favour of the candidate polling next highest number of votes to be declared as elected. The Representation of the People Act has been held to be silent on the point of declaration. Similar is the position under the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 in contradistinction to the provisions contained in section 33(2) of the MMC act and the BMC act. There is

one more judgment which has direct application to the case in hand in the case of ***Kadam Rupsing Bhivji*** v/s ***Returning Officer, Municipal Council, Ahmednagar & Ors.*** 1998(3) Mh.L.J. 293 which deals with interpretation of section 21of the Municipalities Act. Learned Single Judge concluded in para 32 that in case where there are more than two candidates, the candidate securing second highest number of votes cannot be declared elected and in such cases only alternative left is to go through the election process again. So concluding the declaration granted in favour of the candidate securing next highest votes came to be set aside. Learned Single Judge has placed reliance on a Division Bench judgment of this Court reported in the case of ***Pyare Saheb Gulzar Chootumiya Sawazi*** v/s ***Dashrath Wasudeo Daff & Ors.,*** Mh.L.J.246 so also another judgment in the case of ***Dnyaneshwar*** v/s ***R.O., Amravati,*** 1998 (1) Mh.L.J. 719. Learned Single Judge of this Court in the said judgment has held that when there are more than two candidates, the question of notice to voters of disqualification becomes significant for the purpose of granting declaration. Thus having regard to the phraseology used in section 21(1) of the Municipalities Act interpreted in the light of the Supreme Court judgment in the case of ***Prakash Khandre*** v/s ***Dr.Vijaya Kumar Khandre & Ors.*** (supra) I am of the clear view that the trial Court has rightly refused to grant a declaration in favour of the petitioner about he being duly elected solely on account of the fact that the petitioner has polled next highest votes. The impugned judgment takes correct view of the legal position and hence no interference with the same is called for. Before I conclude, it will not be out of place to mention that besides challenging the judgment rendered by the District Judge the petitioner has also challenged the order passed below Ex.44 where under a prayer was made to permit the petitioner to lead the oral evidence and the same came to be rejected.

Perusal of the impugned order reveals that the petitioner himself filed pursis and informed the Court that he does not propose to lead any evidence. Acting on the said pursis respondents also declined to lead any evidence. The petitioner had moved an application for expeditious decision of the election petition and thus had chosen not to lead any oral evidence and the parties argued the matter solely for the purpose of interpretation of section 21 and the claim of declaration. The trial Court is justified in rejecting the belated request made by the petitioner seeking permission to lead evidence. The petitioner has been rightly held to be estopped from going back on the assurance given to the Court below that the petitioner does not want to lead any evidence. In the result writ petition is summarily dismissed.

9.10.07